Supreme Court, U.S.
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No. 99-1702

In The

Supreme Court of the United States

THE STATE OF TEXAS,

Petitioner,

v.

RAYMOND LEVI COBB,

Respondent.

On Writ Of Certiorari To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF

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CAPITAL CASE
QUESTIONS PRESENTED

I.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based upon the previously charged burglary as a predicate felony question?

II.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986) and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

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I. RESPONDENT'S INTRODUCTORY STATEMENT

Petitioner frames its arguments within its brief in the reverse of the Questions for Review as submitted in the Original Petition for Writ of Certiorari. Respondent also believes the Second Question as originally submitted is the crucial question for this Honorable Court to consider in this case, thus Respondent addresses the Questions for Review in the reverse order in this brief as well. In addition to the arguments made in the Petitioner's brief, five separate *Amicus Curiae* briefs have been filed in support of the Petitioner. Respondent will, therefore, include commentary on the theories propounded in these Amicus Curiae briefs.

Both Questions for Review in this case involve the Sixth Amendment right to assistance of counsel. Respondent will occasionally refer to the right of an accused to have the guidance and assistance of legal counsel, as guaranteed by the Sixth Amendment, as the *"attorney-client relationship"*. The term is meant to be all inclusive of the duties and responsibilities required of counsel in the guidance of a defendant through the adversarial process.

Also, in the briefs of Petitioner and *Amicus Curiae*, a suggestion is made that Respondent's pretrial attorney implied his consent and therefore waived any complaint with regard to law enforcement's interrogation of Respondent because counsel had granted permission for law enforcement to talk to Respondent on two prior occasions, when they had assured the attorney the Respondent was not a suspect. There is also a contention that the statement made by the attorney during his pretrial suppression testimony, that he was not Respondent's

counsel for the "capital murder charge" constitutes an admission that Respondent's right to counsel had not attached, even though this passing statement is clearly taken out of context. Finally, there are arguments implying that the admission of the confession taken from Respondent was harmless error in this case.

The Texas Court of Criminal Appeals rejected these arguments based upon the state trial court findings of fact and independent state law grounds. Therefore, Respondent submits that none of these collateral arguments should be considered by this Court. These issues were not submitted to the Court in any of the Questions for Review and these interpretations of the facts are not implicated in the Court's granting of certiorari on the two Questions for Review. It is well-settled that the state court's fact-findings must be given great deference by this Court, as the Court's jurisdiction normally applies only to determination of questions of federal law. *See* SUP. CT. R. 10 (revised May, 1999); *Haynes v. Washington*, 373 U.S. 503, 515-16 (1963); *Arizona v. Fulminante*, 499 U.S. 279, 287 (1991). Consequently, Respondent will not directly speak to these arguments, unless, of course, the Court requests an additional briefing on these matters.

II.

SUMMARY OF ARGUMENT

With regard to Question No. 1, Respondent submits that:

1. The arguments of Petitioner and the *Amicus Curiae*, if adopted, would permit law enforcement to freely and arbitrarily violate a defendant's Sixth Amendment right to counsel under circumstances where the state

already knows, or clearly should know, that an *attorney-client relationship* exists.

2. The *"inextricably intertwined"* or *"closely related"* offense exception, as derived by the lower courts from *Brewer v. Williams*, 430 U.S. 387 (1977), and *Maine v. Moulton*, 474 U.S. 159 (1985), should be formally adopted by this Court in order to comport with Sixth Amendment protections. Under the facts in this case, as interpreted by Texas law, the burglary offense, for which Respondent was represented by counsel, was clearly covered under this related offense exception.

3. While Petitioner implies that the prior Sixth Amendment decisions of this Court are "unworkable" and "confusing" to law enforcement and the courts, Respondent will show that lower courts have been interpreting these rules for years without substantial difficulty or confusion.

4. Petitioner concedes that some *"related crime"* test should be adopted and proposes that said test be based on the elements of the offense. Respondent submits that a simple and workable fact-based test should be adopted by this Court, rather than the complicated test proposed by Petitioner.

With regard to Question No. 2, Respondent submits that:

1. The decisions of this Court dealing with the Sixth Amendment right to assistance of counsel are easily reconciled based upon their factual circumstances, thus negating the need for abandonment of *stare decisis*.

2. The Petitioner's desire that the Court overrule *Michigan v. Jackson*, 475 U.S. 625 (1986), is unnecessary generally, and clearly unnecessary under the facts in this case.

III.

ARGUMENT AND AUTHORITIES

QUESTION NO. 1

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine v. Moulton*, 474 U.S. 159 (1985), and *McNeil v. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based upon the previously charged burglary as a predicate felony?

A. Summary of Supreme Court Right to Counsel Decisions

Over the years, this Court has found that the interpretations of the protections of the Fifth and Sixth Amendments, where a criminal defendant has *invoked his right to counsel*, are controlled by the factual distinctions as to when the right to counsel is invoked, i.e., before or after the defendant is formally charged and whether the interrogations involve "related" or "separate and different" offenses. A brief review is in order.

- In *Brewer v. Williams*, 430 U.S. 387 (1977), the Court concluded there was a Sixth Amendment violation when the police continued to interrogate the defendant, who had counsel on a kidnapping charge, and the interrogation led to the confession of a murder that arose out of the kidnapping offense for which the defendant had been arrested.
- In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Court concluded that the Fifth Amendment does not protect a defendant from further interrogation on completely

separate crimes when counsel had been requested on a previous offense, but before counsel was obtained.

- In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court concluded that a Fifth Amendment violation occurred when the defendant was arrested for multiple offenses (burglary, robbery, and murder) and requested counsel, but, before an attorney-client relationship was formulated, interrogations took place without any showing that the defendant "voluntarily waived" his right to counsel.
- In *Maine v. Moulton*, 474 U.S. 159 (1985), the Court concluded that a Sixth Amendment violation occurred when law enforcement officers continued to investigate and "bugged" the defendant with the use of an informant, in an attempt to collect evidence of other crimes when the defendant was already charged with a factually related offense and represented by counsel.
- In *Michigan v. Jackson*, 475 U.S. 625 (1986), another case interpreting the Sixth Amendment, the defendant requested counsel during his arraignment. Before he had an opportunity to consult with counsel, however, he was questioned by officers about the primary offense. This Court concluded that, because the Sixth Amendment attached at the time of the arraignment, further interrogation was improper.
- In *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court again interpreted the Fifth Amendment and found that a violation occurred when a defendant, after he requested counsel with regard to one specific offense, but before he had opportunity to consult with that counsel, was interrogated by another officer about a completely separate offense. The Court specifically noted in ruling the confession inadmissible that, even though separate offenses were involved in the interrogations, there was no distinction under the Fifth

Amendment once the defendant requested the assistance of counsel.

- In *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Court addressed a pre-indictment situation where the defendant was interrogated by the FBI about federal offenses and requested counsel, but was thereafter interrogated by state officials about a separate crime in Mississippi which the defendant confessed to without the presence or knowledge of counsel. Because the defendant had not been indicted on any offense, the Court utilized the Fifth Amendment protections and held that the request for counsel to the federal officers prevented the state officers from interrogating the defendant without counsel. The confession was inadmissible.

- In *Michigan v. Harvey*, 494 U.S. 344 (1990), the Court concluded that a Sixth Amendment violation occurred where a defendant, who had counsel, was interrogated without notifying his counsel and consequently made incriminating statements. The Court held that such statements could be used for impeachment only but, since the state had not used the confession during their case in chief, upheld the conviction.

Thus, as of the decision in *Harvey*, the decisions of the Court appeared to be relatively consistent with regard to the application of the Fifth and Sixth Amendment principles for many years. In the 1991 case of *McNeil v. Wisconsin*, 501 U.S. 171, however, the Court addressed the question that had been brought before the Wisconsin Supreme Court:

> Does an accused's request for counsel at an initial appearance on a charged offense constitute an invocation of his Fifth Amendment right to counsel that precludes police interrogation on *unrelated*, uncharged offenses? *Id.* at 175. (emphasis supplied)

In *McNeil*, the defendant obtained counsel after being formally charged with robbery. He was subsequently interrogated by law enforcement officers from another jurisdiction about completely separate crimes, to which the defendant confessed without invoking his right to counsel on those charges. The Court ruled the confession admissible because the defendant waived his right to counsel under the Fifth Amendment. The Court further stated that the Sixth Amendment right to counsel did not attach to the separate and distinct charges because the Sixth Amendment is "offense-specific" and does not attach until adversarial proceedings commence.

In reviewing this Court's decisions involving the right to counsel protections of the Fifth and Sixth Amendments, it is appropriate to conclude that:

1. Under the Fifth Amendment, once the right to counsel is invoked by a defendant on a criminal offense prior to a formal charge being initiated, the defendant is protected from interrogation on the primary offense, as well as any other separate and distinct offenses. This is true even if they are unrelated to the primary charge for which the defendant requested counsel, unless the defendant initiates contact with law enforcement. See *Arizona v. Roberson*; *Minnick v. Mississippi*; cf. *Michigan v. Mosley*, 423 U.S. 96 (1975).

2. Under the Sixth Amendment, once the right to counsel is invoked, it is impermissible for law enforcement to invade the attorney-client relationship after counsel is secured for a particular offense where law

enforcement is seeking to obtain information related to that specific offense. See *Massiah v. United States*, 377 U.S. 201 (1964); *Spano v. New York*, 360 U.S. 315 (1959); *United States v. Henry*, 447 U.S. 244 (1980). This does not include, however, a situation with the use of *passive* informers. See *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

3. The "offense-specific" limitation on the Sixth Amendment of *McNeil* is applicable only to situations where the defendant, after he has invoked his right to counsel, is interrogated regarding offenses that are clearly separate and distinct from the charged offense, perhaps even from a separate jurisdiction. This does not constitute a conflict with the holdings of *Michigan v. Jackson*, *Michigan v. Harvey*, *Brewer* or *Moulton*. Nothing in *McNeil* directly overrules those previous decisions. Consequently, *Brewer* and its progeny do not constitute exceptions to *McNeil*. To the contrary, *Brewer* is a starting point for any Sixth Amendment analysis.

B. The Protection of the Right to Counsel is Crucial

Respondent submits that it would be disastrous to the protections of the Sixth Amendment if this Court acquiesces to Petitioner's attempts to validate law enforcement efforts to interrogate a citizen, with an existing and on-going attorney-client relationship, about possible offenses that are closely related, inextricably intertwined, or otherwise implicated in the same criminal transaction for which the citizen is charged. Such acquiescence would permit law enforcement officers almost complete and total license to conduct unwanted and

uncounseled interrogations of a defendant about matters that are clearly covered under the *reasonable scope* of the Sixth Amendment's guarantee of a citizen's right to effective assistance of counsel.

Reference to case law is not necessary to grasp the reality that, when an attorney-client relationship is formed in a criminal matter, whether by court appointment of counsel or otherwise, the attorney must inquire into and investigate all the facts of the criminal transaction for which his client was arrested, regardless of the offense charged, in that there may be a number of interrelated offenses. The attorney must recognize all potential criminal liability arising from the transaction, not just the charge for which the client was arrested. It is always possible that new charges may be brought against the client, as the state is free to continue its investigation. This is especially true when the potential charges stem from the same criminal transaction. It is not realistic to expect a different attorney be appointed or hired for each possible offense. Thus, the criminal defense system must recognize that a *competent* attorney should be allowed to investigate all related crimes for trial preparation and even utilize them if he is seeking a plea bargain that will minimize potential criminal liability to his client.

As a matter of law, an attorney's responsibility to his client must include the consideration of the impact of any closely related crimes, lesser included offenses and all offenses that arose out of the same criminal transaction. If the attorney does not make such a full investigation, he would clearly be guilty of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Cronic v. United States*, 466 U.S. 648 (1984); *Powell v. Alabama*,

287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Yet according to Petitioner, the requirement of competency by the attorney must bow to the state's interest in being able to investigate crime. Under well-recognized constitutional principles, the protection of the Sixth Amendment guarantee cannot be held inferior to the government's right to investigate crime. *See Michigan v. Jackson*. The protections of the Sixth Amendment simply must take precedence. *See Massiah; United States v. Henry; Michigan v. Harvey*.

How is the attorney to maintain and protect the integrity of the attorney-client relationship when law enforcement can continually interrogate the client without the knowledge or presence of counsel on each and every potential offense arising out the same transaction? Because no formal charges on these related offenses are involved, the defendant cannot demand appointed counsel. The client would therefore be forced to constantly defend himself personally against persistent attempts by law enforcement to interrogate him on such related offenses, even though the interrogation involves conduct for which his right to counsel has attached. The indigent, uneducated, illiterate, youthful, or possibly retarded defendant would be at the mercy of law enforcement's continuous efforts to circumvent his rights. In the context of preservation of the Sixth Amendment guarantee of effective assistance of counsel, it does not make sense to allow such repeated invasions.

Although this Court has continuously made clear, the *"Bright-Line"* decisions that prevent such interference

with the attorney-client relationship would be rendered useless if this Court fails to recognize that the attorney's sworn duties clearly include representation of the defendant on all related offenses, especially prior to those related offenses becoming formal charges. *See generally Arizona v. Roberson; Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Edwards v. Arizona*.

Petitioner's argument simply fails to consider the accused's right to have counsel who must adequately investigate all potential criminal liabilities. The acceptance of Petitioner's argument would result in an unacceptable situation where an attorney has discovered other possible criminal liability tied to the charged offense, but he cannot do anything about it, other than allow his client to be continuously interrogated without his knowledge, on numerous potential crimes related to the offense for which he must defend the client.

C. The Related Crimes Concept as Derived from *Brewer, Moulton,* and *McNeil*

Petitioner concedes, throughout its briefs and in the Question presented to this Court, that the burglary charge, for which Respondent had invoked his right to counsel and maintained an ongoing attorney-client relationship, was clearly a *"factually-related"* offense to the capital murder charge on which Respondent was convicted. Petitioner further effectively concedes that some *"related offense"* test should be formulated by this Court and suggests that said test be an element-based test similar to that of *United States v. Blockburger*, 284 U.S. 299

(1932). Respondent submits that the concessions of the Petitioner and the *Amicus Curiae*, that some related offense test should be devised, undermines Petitioner's arguments that the Sixth Amendment should not provide any protections to the Respondent or any other criminal defendant similarly situated.

It is suggested throughout the briefs of Petitioner and the *Amicus* that the decision in *Moulton* was ill-considered. They imply that Court never properly recognized the distinction of interrogations involving crimes that had not been formally charged at the time the attorney-client relationship was violated. The Solicitor General raised the exact same arguments in *Moulton* that he raises in the instant case before the Court. As this Court noted in Footnote 15 in *Moulton*:

> In his brief, the Solicitor General assumes that the only claim made by the Government and answered by the Court in Massiah was that the Government was engaged in a continuing investigation of crimes as to which charges were already pending. Brief for United States as Amicus Curiae, 23-24. So saying, he asks us to distinguish from that justification the justification that law enforcement officials are investigating "separate" crimes. . . . The Court in Massiah was thus faced with the very same argument made by the Solicitor General in this case. Even were the Solicitor General's characterization of the issue posed in Massiah correct, however, we would not draw the distinction he asks us to make. The likelihood of post hoc rationalizing is the same whether police claim to be investigating other examples of the same crime or some allegedly "separate" crime. We

> take what we feel is a more realistic view of police investigations, and instead accept that dual purposes may exist whenever police have more than one reason to investigate someone." 474 U.S. 159, 179-80, n. 15.

Thus it is clear that, ever since *Massiah* in 1964, the Solicitor General has been making the same arguments made here, claiming that because "charges are not pending" at the time the attorney-client relationship is violated, the constitutional protections should not apply. This Court has previously rejected those claims and should do so here as well.

Petitioner claims that "[t]he Court's precedents support no exception to the general rule that the Sixth Amendment attaches only to the charged offense," and that "[n]either *Moulton* nor *Brewer* supports an exception to *McNeil*." Brief for Petitioner at 15. Respondent would respectfully show, contrary to Petitioner's claims, these very cases cited demonstrate that this Court's precedents clearly do support such an exception.

As noted previously in the summarization of cases in this brief, *Brewer* dealt with an arrest for kidnapping and a murder prosecution arising out of that abduction, where the defendant had not been charged with murder when the Sixth Amendment violation occurred. In *Moulton*, the defendant had been charged with theft, but had not yet been charged with burglary when the Sixth Amendment violation occurred. The theft offense was *"inextricably intertwined"* or *"closely related"* to the burglary offense because the vehicles and/or parts that were stolen were taken during the burglaries. *See Maine v.*

Moulton, 481 A.2d 155, 162-63 (Me. 1984). The same factual applications are present in the case before the Court. Respondent was charged with burglary and ultimately prosecuted for capital murder arising out of that burglary. The burglary charge is "inextricably intertwined" or "closely related" to the capital murder charge.

In *McNeil*, this Court did not modify or overrule either *Brewer* or *Moulton*, even though it clearly had the opportunity to do so. *Id.* at n.15. The terms *"offense-specific"* and *"charge at issue"* appear to be the only references by the Court in *McNeil* as to the extent of the Sixth Amendment limitations in this context.

As noted, the Sixth Amendment's guarantee of effective assistance of counsel mandate that an attorney investigate and advise a criminal client about all potential liabilities which could expose the client to additional charges arising out of the same transaction for which the attorney has been engaged. A reasonable interpretation of the terms *"offense-specific"* or *"charge at issue"* in this context must include crimes, even though separately defined under the Penal Code, that: (1) are part of the same criminal transaction or criminal episode; or (2) have common elements that could be prosecuted by the state under a number of different penal code provisions; or (3) constitute lesser included offenses; or (4) are directly related or intertwined by the conduct, intent, or culpability of the actor; or, perhaps, (5) where under the law of that jurisdiction, these "related crimes", even though not formally charged, come within the ambit of responsibility and duty owed by counsel to be investigated on behalf of his client.

Texas law allows all crimes occurring as part of a criminal episode to be prosecuted in a single criminal proceeding Sections 3.01-3.02, Texas Penal Code. In addition, the Texas Court of Criminal Appeals permits any such offenses arising out of a criminal episode to be prosecuted in one criminal proceeding. *See Rios v. State*, 846 S.W.2d 310 (Tex. Crim. App. 1992). As the Texas courts have adopted the test of *Strickland v. Washington*, to be equivalent to the Texas Constitutional requirements of "effective assistance of counsel", *see Hernandez v. State*, 726 S.W.2d 53 (Tex. Crim. App. 1986) and *Hernandez v. State*, 988 S.W.2d 770 (Tex. Crim. App. 1999), it is obvious that an attorney in Texas has the constitutional *duty* to provide legal assistance to a client with regard to all offenses arising out of a criminal episode in this State.

In this case, the crime of "burglary" had the same elements of both the original burglary charge under Section 30.02, Texas Penal Code and the predicate offense of the second count of the capital murder indictment under Section 19.03(a)(2) of the Texas Penal Code. The burglary and the capital murder charges arose out of the same criminal episode and criminal transaction as defined under Chapter 3 of the Penal Code. The burglary and capital murder occurred at the exact same time, at the same place, in the same judicial venue, and involved the same victims and law enforcement entity.

In *United States v. Arnold*, 106 F.3d 37 (3rd Cir. 1997), the Court of Appeals justified the related offense exception to the offense-specific rule in *McNeil*, stating that:

> [t]he reasoning underlying this exception is consistent with the purposes and protections of the Sixth Amendment. When the pending charge is

> 'so inextricably intertwined' with the charge under investigation, 'the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense.' . . . '[T]o hold otherwise would allow the [government] to circumvent the Sixth Amendment right to counsel merely by charging a defendant with additional related crimes' after questioning him without counsel present. *Id.* at 40-41 (citations omitted).

Besides the capital murder count for which Respondent was convicted (murder of more than one person in the same criminal transaction, Section 19.03(a)(7)(A)), Texas Penal Code. Respondent alternatively could have been charged and prosecuted for a number of capital murder charges. For example, under Section 19.03(a)(2) of the Texas Penal Code, Respondent could have been charged with murder intentionally committed in the course of committing kidnapping, burglary, or robbery. Under Section 19.03(a)(8) of the Texas Penal Code, Respondent could have been charged with capital murder for the murder of an individual under six years of age. Nine separate capital murder charges were possible in this case. In addition to the capital murder charges, there were certainly dozens of other charges, including misdemeanors, felonies, lesser included offenses, criminal attempts, etc., that could have been charged against Respondent as part of this "criminal episode".

Respondent strenuously contends that attorney Ridley had a responsibility, under both Federal and Texas law, to investigate, prepare, advise, and consult with Respondent about all of these potential charges as an integral part of his representation. Obviously, Ridley did

not have to accept appointment for Respondent in any eventual trial proceedings, but Ridley's *legal duty* to Respondent on this burglary case clearly did extend to all related charges arising out of the actions committed by the Respondent during that Texas criminal episode. Ridley attempted to provide those services, but the State, by not notifying Ridley upon obtaining the arrest warrant for Respondent in November, 1995, clearly thwarted Ridley's ability to properly represent Respondent in a constitutionally meaningful way.

Petitioner argues that, because Respondent was not "convicted" of the capital murder count with the predicate offense of burglary, the previous custodial interrogation without benefit of counsel should not fall under the umbrella of Sixth Amendment protections. That argument is an attempt to "close the barn door after the horse has gotten away". Bearing in mind that the decision as to what offense to charge lies strictly within the discretion of the government, the fact that Respondent was not subsequently convicted of the burglary-predicate offense capital murder is constitutionally *irrelevant* to the issue presented to this Court.

It should be of no moment that the State's pursuit of one of many charges at trial had any bearing upon the prior invasion of his Sixth Amendment rights. That is equivalent to saying that because an illegal search turned up evidence of criminality, the search should be retroactively justified. Such a concept has been rejected by this Court for decades. *See Mapp v. Ohio*, 367 U.S. 643 (1961). Once a constitutional violation is shown, the government should not be able to benefit from the illegally obtained evidence at any future criminal proceeding. *See Wong Sun*

v. United States, 371 U.S. 471 (1963). The State did benefit here, since the confession admitted to the jury included details of the burglary, the charge for which Respondent was represented by counsel at the time of the violation.

D. There was No Waiver of the Right to Counsel

Even though the primary law enforcement agency in this case (Walker County) brought in another agency (Odessa Police), there was no confusion by Walker County law enforcement as to Respondent's legal representation and such knowledge must also be imputed to the actions of the Odessa police officers. *See Michigan v. Jackson; Arizona v. Roberson; Minnick v. Mississippi.* It is an undisputed fact that the Walker County officials believed Respondent to be their best suspect, certainly as of September, 1995, on possible crimes arising out of the burglary. *See* Trial Court Findings, Petitioner's Appendix to certiorari petition, D-5, Finding No. 17.

This Court has made it clear that once a defendant invokes his right to counsel, as Respondent did here, under either the Fifth or Sixth Amendment, it is not a waiver of that right to counsel if the defendant gives incriminating statements upon interrogation by the state, even with *Miranda* warnings, when the defendant has not been allowed to consult with his attorney. *See Edwards v. Arizona; Arizona v. Roberson; Minnick v. Mississippi; Michigan v. Harvey; Estelle v. Smith*, 451 U.S. 454 (1981). None of these cases are challenged by Petitioner in this case. *See also Carnley v. Cochran*, 369 U.S. 506 (1962); *Johnson v. Zerbst*, 304 U.S. 458 (1932); *Brewer v. Williams; Miranda v.*

Arizona; Escobedo v. Illinois; Faretta v. California, 422 U.S. 806 (1975).

Petitioner also contends that *Patterson v. Illinois*, 487 U.S. 285 (1988), is an authority for finding a subsequent waiver of counsel at the 1995 custodial interrogation. Respondent submits that *Patterson* can easily be distinguished on the basis that, initially, there was no indication in *Patterson* that the defendant ever requested counsel for anything, even after he was advised of his rights to counsel. *Patterson* does not involve a situation where the attorney-client relationship already existed, as occurred in the instant case. Further, the majority opinion in *Patterson* cited with approval the holding in *Michigan v. Jackson*.

Respondent submits that, because there was an invocation of the right to counsel and a fully formed attorney-client relationship had been firmly established in this case, *Patterson* was decided based on completely different factual considerations than the case at hand and is not appropriate authority.

Petitioner additionally cites *Davis v. United States*, 512 U.S. 452 (1994), for the proposition that, because this Court has mandated a defendant's request for counsel must be *unequivocal*, a defendant's Sixth Amendment protections have been somehow diluted. However, this case is not one involving a "mere assertion" for counsel, but is a case in which Respondent not only requested counsel, but obtained counsel during a judicial proceeding. The prohibited interrogations occurred during an attorney-client relationship which had existed for a substantial period of time and was known to the authorities

involved. Likewise, any reliance upon *Moran v. Burbine*, 475 U.S. 412 (1986), is unwarranted since at no time in *Moran* did the defendant ever personally invoke his right to counsel under either the Fifth or Sixth Amendment interpretations. The record in the instant case will not support any finding that the 17 year old Respondent waived his already perfected right to counsel when interrogated by the Odessa police.

E. The Law Enforcement Bad Faith Exception

This Court has made it clear that Due Process and the Sixth Amendment right to counsel protect citizens against law enforcement that intentionally, or in bad faith, attempt to surreptitiously invade the attorney-client relationship. *See Massiah v. United States; Michigan v. Harvey; United States v. Henry; Spano v. New York*. The findings of the state courts here make it clear that all Walker County law enforcement agents involved knew that Respondent was a suspect in the disappearance and possible death of these victims, as well as the fact that Hal Ridley had been the Respondent's attorney for almost a year and a half. Throughout the period of Ridley's representation, the Walker County law enforcement agents had suspicions that the burglary had instigated the entire criminal transaction and requested Ridley's permission to speak to Respondent on two separate occasions. However, Walker County officials chose not to inform the Odessa Police that Respondent had counsel, nor inform Respondent's counsel of the arrest warrant and interrogation. This came as some surprise to the Odessa police, as was reflected in their testimony.

During the pretrial suppression hearings on this confession, the State offered no excuse, justification, or rationale for its failure to contact Ridley or inform the Odessa police that Respondent was represented by counsel. Not one of the State's witnesses offered any testimony or evidence as to why they did not contact counsel during the entire time that they were discussing probable cause with the Odessa police, preparing and obtaining an arrest warrant for Respondent, transmitting that warrant to Odessa, etc. Attorney Ridley was not even contacted after Respondent was returned to Walker County, when law enforcement officers took Respondent on a lengthy videotaped search for the bodies of the victims. It was not until several hours after all of the interrogations that Ridley was notified of Respondent's arrest and confession.

The trial court findings support the conclusion, in fact, that Ridley had been misled by the officers for a period of time. The Walker County officials indicated to Ridley that Respondent was not a suspect until only a few weeks before his arrest. *See* State of Texas Petition for Certiorari, Appendix D-5, Trial Court Findings No. 15-17. As this Court stated in *Moulton:*

> [the] knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. 474 U.S. 159, 176, (1985).

Absent any evidence to show justification for not notifying counsel, Respondent submits that this record clearly supports the logical conclusion that the invasion

of the attorney-client relationship was intentional and knowing on behalf of the Petitioner's agents, in violation of constitutional principles.

F. The Double Jeopardy Elements Test is Inappropriate

In the *Amicus Curiae* brief of the Solicitor General of the United States, it is argued that this Court should apply a Fifth Amendment Double Jeopardy analysis under *United States v. Blockburger*, 284 U.S. 299 (1932), to determine which offenses are "related" under the Sixth Amendment protection, citing *Dixon v. United States*, 509 U.S. 688 (1993). As noted, this argument concedes that the formulation of some reasonable test for utilizing a "related offenses" test is required. However, this argument also presumes that what happens later, at trial, is dispositive of what previously occurred at the time law enforcement officials invaded the attorney-client relationship. Ultimately, this argument simply ignores the fact that the State has the absolute discretion to decide what offenses to charge.

Respondent submits that the arguments of Petitioner and *Amicus* are astonishing. They are suggesting that law enforcement agencies across the country, in their efforts to investigate criminal offenses, should be cognizant of the complex and intricate holdings of this Court with regard to what constitutes Double Jeopardy under the Fifth Amendment. As an initial reaction, Respondent notes that *Dixon* overruled *Grady v. Corbin*, 495 U.S. 508 (1990), a case that was barely three years old at the time. *Grady* obviously caused great confusion in the Court as to

the application of the Double Jeopardy doctrine to a wide variety of pleadings and charges which could be instituted against a criminal defendant. *See Grady*, (concurring and dissenting opinions). Further, both *Grady* and *Dixon* involved criminal contempt cases, not the general variety of penal code offenses involving statutory elements.

It does not seem appropriate to allow the State the option of violating a defendant's right to counsel and then later bring the defendant to trial on related, but albeit statutorily different, offenses for the purposes of covering up the constitutional violation. In the instant case, as previously shown, numerous related but statutorily distinct crimes could have been alleged by the state in the subsequent indictment.

Respondent recalls this Court's words in *Ashe v. Swenson*, 397 U.S. 436, 444 (1970), when it was recognized that the state has the ultimate discretion as to what offenses to charge and there are a vast number of "hypertechnical and archaic" pleadings that can be utilized by a prosecutor to charge various offenses, which should require a factual analysis, rather than some technical statutory elements analysis. *See also Green v. United States*, 355 U.S 184 (1957); *Harris v. Oklahoma*, 433 U.S. 682 (1977); *Brown v. Ohio*, 432 U.S. 161 (1977).

This Court specifically held in *Dixon* that, if an offense was a lesser included offense, even the *Blockburger* test would suffice to bar prosecution. Respondent submits that, under Texas law, the Texas Court of Criminal Appeals has consistently allowed juries to be instructed on lesser included offenses, even in capital cases, where included in the primary charge are some

elements of other crimes under the Texas Penal Code, even though such offenses are not statutorily considered to be lesser included by the Penal Code. *See Broussard v. State*, 642 S.W.2d 171 (Tex. Crim. App. 1982); *Day v. State*, 532 S.W.2d 302 (Tex. Crim. App. 1975); *Chanslor v. State*, 697 S.W.2d 393 (Tex. Crim. App. 1985); *Bartholomew v. State*, 871 S.W.2d 210 (Tex. Crim. App. 1994); *Bignall v. State*, 887 U.S. 21 (Tex. Crim. App. 1994); *Jones v. State*, 984 S.W.2d 254 (Tex. Crim. App. 1998); *Arevalo v. State*, 963 S.W.2d 887 (1997), on remand, 970 S.W.2d 547 (1998); *Homan v. State*, ___ S.W.2d ___ (Tex. Crim. App., No. 578-99, May 31, 2000).

Consequently, under the Petitioner's *Blockburger* test argument, if utilized, the offense of burglary is a common law lesser included offense of one of the capital murder counts in this indictment, even though that indictment count was subsequently dismissed. Once again, it is respectfully submitted that the State should not be able to benefit by engaging in constitutionally prohibited conduct through the utilization of its subsequent discretion with the pleadings.

Respondent submits that, should the Court consider adopting some form of the Double Jeopardy test, there is uncertainty as to how the Dual Sovereignty doctrine would be applied. Under the Dual Sovereignty doctrine, federal and state prosecutions may occur based on the same exact conduct. *See Bartkus v. Illinois*, 359 U.S. 121 (1959). Since it is obvious that the United States Congress has federally criminalized most street crimes which the states were originally responsible for, it is now almost impossible not to be able to pursue a federal prosecution

for most felonies contemporaneous with the state's prosecution. In the instant case, the FBI could have been called in to investigate the disappearance of the victims under the Federal kidnapping statute. 18 U.S.C. § 1201. Theoretically, in this case, once Petitioner had invoked his right to counsel to the state homicide charge when he was arrested in November, 1995, under the Petitioner's urging of the Double Jeopardy concept, the Dual Sovereignty exception could be invoked, allowing the FBI to question the Respondent, even though the state authorities were barred. Of course, such action would conflict with the rules holding that the invocation of the right to counsel applies to all law enforcement agencies, both federal and state alike. *See Minnick v. Mississippi; Westover v. United States*, 384 U.S. 436 (1966).

Finally, the Double Jeopardy provision has also incorporated other doctrines barring jeopardy, including the "multiple punishment" prohibition, *see North Carolina v. Pearce*, 395 U.S. 171 (1969), and the collateral estoppel doctrine of *Ashe v. Swenson*. It is unclear how these doctrines will be integrated into the suggestions by Petitioner and the *Amicus Curiae* that the Fifth Amendment Double Jeopardy rules should be applied retroactively to the Sixth Amendment violation committed here. Under Texas law, the requirements of Chapter 3 of the Texas Penal Code allow single trials that consolidate all crimes out of the same criminal episode, thus potentially satisfying the multiple punishment prohibition of *Pearce*. The decision in *Ashe* requires a particular factual analysis of the evidence, not merely a review of statutory elements, as does *Blockburger*.

As Respondent understands the arguments of Petitioner, a small town deputy sheriff or police officer is supposed to analyze and properly apply the complicated concepts of Double Jeopardy before determining when he can interrogate a possible suspect that he knows has counsel for a factually related, but statutorily different, offense. Respondent cannot begin to imagine the ultimate confusion of law enforcement that will occur in their attempts to interpret the application of the Double Jeopardy doctrine that was discussed in *United States v. Dixon*. Respondent submits that the use of this test would also cause substantial confusion of application by the lower courts in this country.

Respondent thinks that it would be far simpler to require that law enforcement officers have some basic knowledge of the offenses within their individual jurisdictions (as they must admittedly have to be certified officers) and then assume that the officers will reasonably understand which factually related offenses arise out of a single criminal episode, as a routine investigation will uncover. In the vast majority of cases, officers can easily determine whether the interrogation might invade the attorney-client relationship built upon an offense factually related to those being investigated. Because the formulation of a rule for application must be applied nationally, it is reasonable to conclude that any test this Court devises must have flexibility to apply in all jurisdictions and under the particular laws of each state.

The test submitted by the Petitioner is simply a sham argument meant to convince this Court to "open the doors", allowing law enforcement to violate Sixth Amendment protections. Because of the vagaries of the

different statutory processes in the various states, it is submitted that Respondent's suggestions make much more practical and constitutional sense. Respondent asks this Court to reject this unworkable and confusing *Blockburger* elements test.

G. There is a Lack of Confusion in the Lower Courts

Petitioner claims that the decisions in *Moulton* and *Brewer* have caused confusion in the lower courts and with law enforcement agencies as to how a related offenses exception should be applied. Respondent would simply show that *Moulton* and *Brewer* have been in existence for decades, and that the lower court decisions applying the related offenses exception appear to be relatively uniform and consistent. There is certainly no showing that there is any substantial confusion among law enforcement agents. As noted prior, the application of a *Blockburger* element based test would in fact cause substantial confusion.

In support of Respondent's contentions that the United States Courts of Appeals seem to be relatively uniform in their application of a *related offenses* exception, Respondent would set out the following leading authorities from each Court of Appeals that have discussed the issue:

First Circuit: United States v. Nocella, 849 F.2d 33 (1988); *United States v. Bender*, ___ F.3d ___ (No. 99-2190, August 4, 2000).

Second Circuit: *United States v. Mapp*, 170 F.3d 328 (1999); *United States v. Ming He*, 94 F.3d 782 (1996).

Third Circuit: *United States v. Arnold*, 106 F.3d 37 (1997).

Fourth Circuit: *United States v. Kidd*, 12 F.3d 30 (1993); *United States v. Melgar*, 139 F.3d 1005 (1998).

Fifth Circuit: *United States v. Carpenter*, 963 F.2d 736 (1992); *United States v. Cooper*, 949 F.2d 737 (1991).

Sixth Circuit: *United States v. Doherty*, 126 F.3d 769 (1997).

Seventh Circuit: *United States v. McKinley*, 84 F.3d 904 (1996).

Eighth Circuit: *Hellum v. Warden*, 28 F.3d 903 (1994).

Ninth Circuit: *Hendricks v. Vasquez*, 974 F.2d 1099 (1992); *United States v. Covarrubias*, 179 F.3d 1219 (1999); *United States v. Martinez*, 972 F.2d 1100 (1992).

Tenth Circuit: *United States v. Micheltree*, 940 F.2d 1329 (1991).

Eleventh Circuit: *United States v. Terzado-Madruga*, 897 F.2d 1099 (1990).

District of Columbia Circuit: *United States v. Watson*, 894 F.2d 1345 (1990) (error not perfected for review).

Respondent would also note that the cases considered by the individual states are similarly consistent. *See People v. Clankie*, 530 N.E.2d 448, 452 (Ill. 1988); *State v. Tucker*, 645 A.2d 111, 120-25 (N.J. 1994), *cert. denied*, 115 S.Ct. 751 (1995); *In re Pack*, 616 A.2d 1006, 1008-11 (Pa. 1992); *Whittlesey v. State*, 665 A.2d 223 (Md. 1995), *cert. denied*, 116 S.Ct. 1021 (1996); *Commonwealth v. Rainwater*, 681 N.E.2d 1218 (1997); *Taylor v. State*, 726 So.2d 841 (1st C.A. 1999). *See also Wesbrook v. State*, ___ S.W.3d ___ (Tex. Crim. App. September 20, 2000). The national jurisprudence thus demonstrates no substantial confusion concerning application of the Sixth Amendment principles previously announced by this Court.

H. Independent State Grounds for Affirming the Texas Court of Criminal Appeals

Respondent contends that it is vital for this Court to understand that, due to the particularities of Texas law, the Federal Questions presented here should be analyzed more closely, especially when attempting to craft a rule that applies to different state jurisdictions. As noted previously, Texas joinder requirements permit all crimes occurring during one criminal episode to be tried together in a single proceeding and Texas case law permits a predicate offense in a capital murder charge to be a lesser included offense, allowing the jury to acquit on the homicide and convict on the predicate offense. Other provisions of Texas law should also be mentioned here which may have ramifications on this Court's consideration of this case.

In *Kirby v. Illinois*, 406 U.S. 682, 689 (1972), for example, this Court stated that *"adversary judicial criminal proceedings"* may commence *"by way of formal charge, preliminary hearing, indictment, information, or arraignment."* In Texas, the arraignment proceeding has nothing whatsoever to do with securing counsel. *See* TEX. CODE CRIM. PROC. ANN. art. 26.02. Under Texas law, any criminal

defendant arrested, either with or without warrant, must be taken immediately to a magistrate for the purposes of being advised of his right to counsel and requesting court appointed counsel, if indigent. *See* TEX. CODE CRIM. PROC. ANN. art. 14.06 & 15.07. A defendant may only be formally charged in Texas by an indictment from a Grand Jury, unless the Grand Jury proceeding is waived and the indictment can only be waived if the defendant is represented by "legal counsel". *See* TEX. CODE CRIM. PROC. ANN. art. 1.141. Respondent submits that the Texas right to counsel, under the specific statutes and Article I, Section 10 of the Texas Constitution, attaches at an earlier point in time in the criminal process than is generally recognized. *See also* TEX. CODE CRIM. PROC. ANN. art. 1.051.

If the Highest State Court determines that a set of offenses must be treated as *"inextricably intertwined"* or *"closely related"* under its particular law and practice so as to require application of the *"related offenses"* rule, this should be considered as having been determined on an *Independent State Law* basis. In the instant case, the Texas Court of Criminal Appeals found that the burglary and capital murder offenses were so "related" and that the right to counsel attached to these related crimes. While Respondent recognizes that the Texas Court of Criminal Appeals espoused a Sixth Amendment analysis, it is also true that said result was required under the court's interpretation of Texas law. Respondent believes that there are considerations presented here which may prevent this Court from reversing the decision of the Texas Court of Criminal Appeals, inasmuch as the decision below was based on an independent state analysis of state law and procedure. *See also Holloway v. State*, 780 S.W.2d 787 (Tex.

Crim. App. 1989); *Upton v. State*, 853 S.W.2d 548 (Tex. Crim. App. 1993); *Wesbrook v. State*.

I. Other Considerations

Respondent herein does not seek to extend the decisions of *Moulton* or *Michigan v. Jackson*, or any other precedents, past the instant stated factual presentation. Respondent does not propose, for example, that law enforcement be barred from legitimately taking action by using informants or police officers to investigate *ongoing* or *future crimes*.

Any time law enforcement determines that there are plans being made by a defendant, even if represented by counsel, to engage in *present or future criminal activity*, Respondent concedes that appropriate law enforcement action may be permitted, regardless of whether such actions could be considered invasive of the established right of counsel. *See United States v. Terzado-Madruga*, 897 F.2d 1099 (1990); *Kuhlmann v. Wilson*; *cf. Arizona v. Fulminante*.

Under the Sixth Amendment, the planning and/or commission of present or future crimes would not be protected by attorney-client privilege and therefore no Sixth Amendment protection for those crimes would be necessarily available. *See Nix v. Whiteside*, 475 U.S. 157 (1986) (*The privilege generally does not extend to confidences concerning present and future criminal activity. Id.* at 166-67.); *see also* TEX. R. CRIM. EVID. 503(d)(1); TEX. DISCIPLINARY R. PROF. COND. 1.05(c)(7) & (8); *United States v. Moschiano*, 695 F.2d 236, 240-43 (7th Cir. 1982), *cert. denied*, 464 U.S. 831 (1983). In this case, no such present or future

crimes were involved. After almost two years from the burglary, law enforcement did not perceive that there was any ongoing continuing crimes.

Because it is inconceivable that the circumstances of the instant case would *not* fall under the related offense exception under Texas law, Respondent submits that his rights to the protection of counsel were improperly violated and that evidence was secured and utilized in violation of Respondent's Sixth Amendment rights. The decision of the Texas Court of Criminal Appeals should be upheld in order to protect the Sixth Amendment right to assistance of counsel in this country.

IV.

ARGUMENT AND AUTHORITIES

QUESTION NO. 2

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan v. Jackson*, 475 U.S. 625 (1986), and *Patterson v. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

A. Introduction

Petitioner seeks to radically change the law as stated in *Maine v. Moulton*, 474 U.S. 159 (1985), and *Brewer v. Williams*, 430 U.S. 387 (1977), and requests this Court to directly overrule *Michigan v. Jackson*, 475 U.S. 625 (1986). Such action is completely unnecessary.

The decision in *McNeil v. Wisconsin*, 501 U.S. 171 (1991), confined to its facts, wherein there were separate offenses from different jurisdictions, committed on different dates, is clearly distinguishable from those other authorities. There has been little confusion in the lower courts about the application of *Moulton* and *Brewer*. In fact, the decisions of the federal and state courts show remarkable insight in support of Respondent's position, as previously noted in this brief. It is respectfully submitted that the existence of an attorney-client relationship formulated in this case, lasting over one and a half years, clearly distinguishes this case from Petitioner's claims that there was a "mere assertion" of the right to counsel.

B. Petitioner's Request to Overrule *Michigan v. Jackson* is Unnecessary

In requesting that *Jackson* be overruled, Petitioner claims that since *McNeil* is more recent, the previous decisions protecting Sixth Amendment rights should be limited. Petitioner also argues that the language in this Court's prior decisions was ill-conceived and too broad. To the contrary, Respondent respectfully submits that all the Court's decisions, even *McNeil*, can be easily reconciled upon factual differences.

In *McNeil* this Court did not modify or even attempt to overrule the decision in *Michigan v. Jackson*, as Petitioner now requests. In fact, this Court stated that:

> [o]ur holding in *Michigan v. Jackson*, 475 U.S. 625 (1986), does not, as petitioner asserts, contradict the foregoing distinction; to the contrary, it rests on it. . . . [T]he relevant question was not

> whether the *Miranda* Fifth Amendment right had been asserted, but whether the Sixth Amendment right to counsel had been waived. *Id.* at 179.

This does not sound like a repudiation of *Jackson*. In *Michigan v. Harvey*, 494 U.S. 344 (1990), cited with approval in *McNeil*, it was recognized that the prior holding in *Michigan v. Jackson:*

> created a bright-line rule for deciding whether an accused who has 'asserted' his Sixth Amendment right to counsel has subsequently waived that right. Transposing the reasoning of *Edwards v. Arizona*, 451 U.S. 477 (1981), which had announced the identical 'prophylactic rule' in the Fifth Amendment context, *see Solem v. Stumes*, 465 U.S. 638, 644 (1984), we decided that after the defendant requests assistance of counsel, any waiver of the Sixth Amendment rights given in a discussion initiated by police is presumed invalid, and the evidence obtained pursuant to such a waiver is inadmissible. *Id.* at 349.

As previously noted in this brief, there was no waiver of counsel shown under the facts of this case. The confession in this case was obtained from Respondent after he was arrested and placed into custody in November, 1995. The statements made included Respondent's admission to the burglary for which he was represented by counsel. In *McNeil*, at 176, this Court indicated that *"statements pertaining to other crimes, as to which the Sixth Amendment right has not yet attached, are, of course, admissible at a trial of those offenses,"* acknowledging the prior ruling in *Moulton*. Respondent suggests that *"other crimes, as to which the Sixth Amendment right has not yet attached"*

is limited to crimes that are not closely related, inextricably intertwined, or clearly implicated in the same criminal transaction for which the defendant was originally charged.

In the case before the Court, the confession utilized by the State included references to the burglary for which Respondent was represented by counsel. Therefore, the suggestion that some statements may be inadmissible and others may not, depending upon the particular offense to which they refer, may not be applied here since the jury heard Respondent's admissions to the burglary in a confession that violated the Respondent's right to counsel. The "closely related" or "inextricably intertwined" nature of this criminal episode simply cannot be constitutionally segregated or limited by the language of *McNeil*.

The Majority Opinion in *McNeil* feared that:

> [i]f we were to adopt petitioner's rule, most persons in pretrial custody for serious offenses would be unapproachable by police officers suspecting them of involvement in other crimes, even though they have never expressed any unwillingness to be questioned. *Id.* at 181.

This language reflects the fact that the Court did not consider the offenses involved as having any relationship, because if the Court had considered them to be the same offense, or related, where defendant had counsel, further interrogation without notification to counsel would have been barred. *See Edwards v. Arizona*, 451 U.S. 477 (1981). In addition, it cannot be said that Respondent *"never expressed any unwillingness to be questioned"*, since he had earlier requested and received appointment of counsel. Therefore, *McNeil* is again distinguished. Justice

Kennedy's concurring opinion in *McNeil* lends support to this realization, when it is noted that:

> [l]imiting the extraordinary protections of *Edwards* to a particular investigation would not increase the risk of confessions induced by official efforts to wear down the will of a suspect. (concurring opinion at 183).

In the case before the Court, there was only one *particular investigation* involved. This particular investigation clearly included the multitude of possible offenses occurring in concert with the burglary offense in December, 1993. Respondent submits that his right of counsel, even if limited to this particular investigation, was in fact, violated under the related offense (*particular investigation*) doctrine.

Any attempt to overrule *Michigan v. Jackson* would require this Court to engage in a wholesale re-analysis and modification of all its precedents over the last quarter of a century, impacting judicial and law enforcement practices and procedures that are well-settled. As there is no conflict in these cases, Respondent submits that *McNeil*, *Moulton*, and *Brewer* are all reconcilable, and there is no need to overrule any prior decisions.

C. *Stare Decisis* Considerations

Petitioner and the *Amicus Curiae* seek to have this Court overrule and reject prior decisions, almost in a manner that seems frivolous. Perhaps this is because Petitioner originally submitted to this Court an additional Question for Review which presumed this Court would

overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), in *Dickerson v. United States*, 530 U.S. ___ (No. 99-5525, June 26, 2000). Respondent will not re-analyze the Chief Justice's remarks in *Dickerson*, but would note that the Court made it clear that the principle of *stare decisis* was crucial to maintaining consistency in the criminal justice system. The Court even acknowledged the continuing viability of *Arizona v. Roberson*, 486 U.S. 675 (1988). This Court's decision in *Brewer*, which Respondent submits is almost exactly on point to this case with regard to the facts, has been the law of this country for almost twenty-five years and is well-engrained into judicial and law enforcement practices. Although Petitioner does not seek apparently to directly overrule *Brewer*, this is the import of the theory propounded.

As Respondent has attempted to show, this is simply not a case which necessitates changes in the law. Respondent respectfully submits that it only takes a reasonable interpretation of existing case law and a recognition of the realities of the Sixth Amendment right to counsel provisions, which are meant to ensure the protection of citizens who have invoked their right to counsel and are relying on counsel to protect them from the forces of government.

Respondent recognizes that this Court has indicated, from time to time, that the Fifth Amendment seems to provide "more broad" protection than does the Sixth Amendment. *See Michigan v. Mosley*, 423 U.S. 96 (1975); *McNeil v. Wisconsin*. Respondent would respectfully urge the Court to reconsider this analysis, because he strenuously believes that the Sixth Amendment right to assistance of counsel may be the most single important

protection of all available to citizens in the context of the Criminal Justice System.

Once a defendant's right to counsel attaches to an incident occurring on a particular date and time and in a particular jurisdiction, it is reasonable, logical, and constitutionally appropriate to hold that the right to counsel should not be limited, even if there is only a single formal charge. The government is not limited in continuing its investigation and has the discretion to add, subtract, modify and actively pursue further formal charges arising out of the criminal episode.

If, therefore, the right to counsel is to mean anything, Sixth Amendment protections on related offenses should not be limited. In order to afford the defendant effective assistance of counsel, and since the defendant's counsel has a responsibility to investigate and advise defendant on those offenses which are related, the government must not be permitted to invade the *Constitutional Shield* that is the right to counsel, when it can do so by merely claiming to be investigating new crimes that have not yet been successfully presented to a Grand Jury.

For all the above-mentioned reasons, Respondent would respectfully pray that the Petitioner's requested relief on this Question be denied.

V.

CONCLUSION AND PRAYER FOR RELIEF

Wherefore, premises considered, Respondent asks that this Court affirm the decision of the Texas Court of

Criminal Appeals, or, in the alternative, dismiss this action as improvidently granted.

Respectfully submitted,

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